App. 1

OPINION MODIFIED ON DENIAL OF REHEARING—4/15/04

ORIGINAL OPINION FILED—12/18/03

Docket No. 95350—Agenda 16—September 2003

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. MARY BRAGGS, Appellee.

JUSTICE RARICK delivered the opinion of the court:

Defendant, Mary Braggs, was charged in the circuit court of Cook County with two counts of first degree murder for the deaths of Connie Hall and Donald Rudolph. After refusing to conduct a hearing on defendant's pending motion to suppress statements, the circuit court determined that defendant was unfit to stand trial due to the severity of her mental retardation. The court thereafter conducted a discharge hearing, found the State's evidence sufficient to establish defendant's guilt beyond a reasonable doubt, and remanded defendant to the Department of Mental Health and Developmental Disabilities for a period of five years. Defendant appealed.

The appellate court reversed and remanded. *People v. Braggs*, 302 Ill. App. 3d 602 (1998). Holding that the circuit court had erred when it refused to conduct a suppression hearing, the appellate court remanded the cause for a hearing on defendant's motion to suppress. The appellate court also concluded that the evidence was sufficient to establish guilt beyond a reasonable doubt for purposes of the discharge hearing.

On remand, the circuit court conducted a hearing on defendant's motion to suppress, hearing testimony from the investigating detective, a psychiatrist, a clinical psycholo-

gist, and an assistant State's Attorney who had interviewed defendant after she was formally arrested. The court ultimately ruled defendant was not competent to waive her *Miranda* rights, and consequently granted defendant's motion with respect to statements made to the assistant State's Attorney after defendant's arrest. However, the court did not suppress an inculpatory statement defendant allegedly made to detectives shortly before she was formally arrested, concluding that defendant was not then in custody, there was no evidence of police coercion or misconduct, and the statement was, therefore, admissible. The circuit court determined that a new discharge hearing was not necessary and reinstated the original order committing defendant to the Department of Mental Health. Defendant again appealed.

The appellate court reversed and remanded, stating:

> "[W]hen the trial court ruled that Braggs' statements to the police were admissible because she was not in custody and *Miranda* was inapplicable, it was in error. Likewise, the court's ruling that, in the absence of police coercion or the defendant being in custody, the fact that Braggs was mentally handicapped was to be considered only as to the weight to be given her statements and not as to whether those statements were inadmissible, was in error. The court should have considered whether Braggs' statement to the detectives was voluntary in a state-law sense based upon the totality of the circumstances. [Citation.] One of the factors that the court should have considered was whether Braggs' mental retardation deprived her of 'the capacity to understand the meaning and effect of the confession.' [Citation.] This is particularly important in the present case, where the trial court found the defendant was incapable of waiving her rights under *Miranda* due to her diminished mental capacity." 335 Ill. App. 3d 52, 65.

The appellate court remanded the cause for a new hearing on defendant's motion to suppress, directing the circuit court to conduct a new discharge hearing thereafter. 335 Ill. App. 3d at 69. The appellate court observed, "much of the evidence presented at the motion to suppress hearing was unavailable to the court which conducted the 1996 discharge hearing." 335 Ill. App. 3d at 69.

We granted the State's petition for leave to appeal (177 Ill. 2d R. 315), and we now affirm, with modification, the judgment of the appellate court. We begin with a recitation of the evidence adduced at the suppression hearing.

Chicago police detective Edward Winstead testified that he investigated the deaths of Donald Rudolph and Connie Hall. The victims' bodies were both found in a first-floor apartment located on South Prairie Avenue in Chicago on April 28, 1993. Although officers initially thought that Rudolph had been beaten to death, it was later determined that Rudolph died as a result of strangulation. Hall died as a result of multiple stab wounds. During the course of the investigation, Winstead began looking for defendant.

On May 7, 1993, Survilla Cameron contacted Winstead and informed him that defendant lived with her. Cameron represented herself to be defendant's sister and guardian; however, Winstead admitted he never saw any documentation to substantiate Cameron's claim. After Cameron indicated that Winstead could speak with defendant, Winstead transported defendant and Cameron to Area One and questioned her. Prior to questioning, Cameron informed Winstead that defendant was "mentally incompetent." Winstead admitted one could "clearly see that she was mentally deficient." Cameron agreed to help Winstead in his interrogation of defendant, but cautioned him that defendant was "slow." Winstead did not advise defendant of her *Miranda* rights. The interrogation took place in an interview room with another detective present.

Winstead testified he had difficulty communicating with defendant in that "sometimes she wouldn't answer questions," and other times she was "very slow in answering." In Winstead's own words: "She would be very slow in answering. And her sister would then kind of repeat the question or if Mary Braggs seemed to be paying attention to me she would then answer to her sister." If defendant responded, she would generally direct her answers to Cameron, and Cameron would then "tell [Winstead] what [defendant] was saying." However, Winstead testified he could hear defendant as she spoke. During the interrogation, Cameron acted as an intermediary for Winstead. Defendant's answers were responsive to Winstead's questions in the sense that defendant would respond to questions repeated by Cameron and first posed by Winstead.

Winstead summarized the substance of defendant's statements from the hour-long interrogation. According to Winstead, defendant told him that she was in the apartment on South Prairie Avenue when two black males came to the door. Defendant overheard an argument and hid in the closet. When she came Out, defendant saw Hall dead in the bedroom. Defendant said Hall had been stabbed and was wearing white. Defendant said Rudolph was in the front room. He had been hit in the head with a wrench and had been strangled to death. Winstead testified that defendant's description was "very accurate as to how the victims died and where they were found." Following the interrogation, Winstead took defendant and Cameron home.

On the morning of May 9, Winstead again questioned defendant, this time at Cameron's apartment. As in all of the interviews, Cameron was present. Detective James Redmond was also present. Winstead said defendant was still very slow in answering questions, or she might not answer at all, but during this second interrogation, she

at least spoke directly to him most of the time. Winstead testified he went to question defendant, a mere two days after the first interrogation, "to see if [he] could get a little bit more information, if she recalled more about the two black males who came to the door and the argument." Winstead testified that defendant told him one of the men was named Ron and he was a friend of Cleo. Defendant described the other man as a tall black male. Winstead testified that the investigation revealed Ron Thomas was an acquaintance of Cleo and the victims, and when Winstead located him he was with a tall black male named Mike.

Later that same afternoon, Winstead picked up defendant and Cameron and took them to Area One. Winstead spoke to defendant in an interview room. He indicated, as previously, it took defendant a long time to answer questions. "Often times *[sic]* she would put her head down and say 'I don't know.' " Winstead showed defendant photographs of Ron Thomas and Mike. Defendant quickly identified the photograph of Mike as being the tall black male. Winstead said she was at first uncertain of the identity of Ron Thomas, then she positively him. Winstead testified that when he informed defendant the men were at the police station, defendant changed her story. Defendant then said that these were not the two men who came to the apartment and that it was two different men. Defendant reiterated that two men came to the door and she hid in the closet.

Winstead testified that on that same afternoon he took defendant and Cameron to the scene of the murders. Defendant pointed out where the two bodies were found. Winstead testified that her account was consistent with where the bodies were found by the police. Defendant then showed Winstead the closet where she hid. Winstead testified he examined the closet and defendant "couldn't have possibly fit in there." Winstead then took defendant

and Cameron home, having questioned defendant at three different locations over the course of the day.

On May 12, Winstead transported defendant and Cameron to the polygraph unit of the Chicago police department. Although defendant was cooperative, the polygraph examination was inconclusive because defendant did not register enough emotion. Again, defendant was returned to Cameron's apartment. Cameron and defendant subsequently changed residences.

On June 25, 1993, Winstead picked up defendant and Cameron from their new apartment and again took them to Area One for questioning. Prior to the questioning, Winstead informed Cameron that the police were looking at defendant as a potential suspect. Despite the State's representation otherwise, the record is silent as to whether that information was communicated to defendant. Winstead, another detective, defendant, and Cameron were present in the interview room. Winstead advised defendant of her *Miranda* warnings from a standard form without additional explanation. Defendant made no verbal response; she merely nodded her head in an affirmative manner. Although Winstead could not remember her exact words, he recalled that Cameron said something to the effect of: "he's telling you that you don't have to talk to me and that you're not going to be in trouble or something." Defendant nodded her head in agreement and "seemed to understand what her sister was saying." Defendant never verbally indicated that she understood, and she did not sign a waiver form. Indeed, it is unclear to what extent defendant ever responded to, or communicated with Winstead, He acknowledged that Cameron "initially" acted as an "interpreter," and it is obvious from the foregoing testimony that she was still acting in that capacity on June 25, 1993, despite Winstead's suggestion to the contrary: "After a while, after I talked to [defendant] somewhat, I could begin to understand or

she'd answer me or she wouldn't." The record does not indicate whether Winstead's questions to defendant were suggestive or leading, or whether they called for a narrative response.

Although the transcript of the suppression hearing does not reveal the substance of statements defendant made during the June 25 interview, the testimony of another detective from the discharge hearing indicated that defendant said she and Connie Hall were in an apartment together on April 28, 1993, when Donald Rudolph returned. Rudolph was drunk and struck both defendant and Hall. Defendant then knocked Rudolph down and he struck his head. Hall became upset, accusing defendant of killing Rudolph, and defendant then stabbed Hall a number of times in her upper body. Following the hour-long interview, defendant was placed under arrest. An assistant State's Attorney arrived at the police station and again advised defendant of her *Miranda* warnings.

Dr. Philip Pan, a psychiatrist, testified for the defense. On May 16, 1996, Pan diagnosed the defendant as having moderate mental retardation and determined defendant was unfit to stand trial. He noted that four other psychiatrists had reached the same conclusion. In 1996, Pan concluded it was not likely that defendant could be restored to fitness any time in the near future. On August 31, 1999, Pan again evaluated defendant. Dr. Pan testified that defendant was unfit for trial and would not become fit in the future. Pan also rendered his opinion that defendant was incapable of understanding *Miranda* warnings.

By way of explanation, Dr. Pan testified that defendant could give simple answers to questions she understood, but she was not capable of abstract thinking. Although she knew she was born in 1941, defendant told Dr. Pan, in the course of his 1999 interview, that she was 29 years old. Her

thinking was "idiosyncratic," meaning that she was often "not on the same page" as the person questioning her. She would frequently answer questions in a completely irrelevant manner. When asked the meaning of her right to remain silent, she responded that she already had an attorney. When Pan asked her what it meant that anything she said could be used against her in a court of law, she responded, "he know I didn't do those two crimes. That is something I didn't do."

Dr. Linda Wertzel, a clinical psychologist, also testified for the defense. Wertzel had examined defendant in 1994 and testified to her findings. Wertzel concluded that defendant was mentally retarded with an IQ of 54. Wertzel described her observations of defendant at that time:

> "She was flat and passive, kind of emotionally blunted, no affect. She was overweight. She was—her clothing was dirty. Her hygiene was very poor. She was picking at her skin and nails and nose and ears. She was nonspontaneous in her speech."

Defendant could provide only "simple answers to direct questions and really did not provide a narrative of information." She stated her age to be 29. Testing revealed that defendant functioned, mathematically, at a kindergarten level. Defendant was unsure if she had ever gone to school. She could not read or write.

Wertzel administered a test designed to measure a person's ability to express thoughts accurately and coherently and to comprehend what other people say. She determined that defendant could only express herself at a "very simple childish level" and she could not comprehend more than a one-step command. Wertzel said the test involved asking the subject to touch colored shapes in sequence. Wertzel first asked defendant to touch a red square (one-step command), then asked her to touch a red square and a yellow circle in sequence (two-step

command). Defendant could not get beyond the one-step command. Defendant was inconsistent in her ability to identify shapes correctly. She displayed impairment on both motor speed and motor dexterity tests. She could not accurately draw and number the face of a clock.

When asked the meaning of various Miranda warnings, defendant either said she did not know or she offered an irrelevant or inappropriate response. Eventually, defendant became frustrated and the interview was terminated. As a result of her 1994 examination of defendant, Wertzel concluded that defendant was illiterate, mentally retarded, "only minimally able to care for her basic daily needs, her comprehension of her current circumstances was marginal, and she was unable to understand her *Miranda* rights.

Wertzel examined defendant again in October 1999 and concluded she remained unable to understand her *Miranda* warnings. Dr. Wertzel testified that defendant's behavior was "pretty similar" to her first encounter with defendant. Defendant "acted as though she had only been in jail for about a week." She identified Kennedy as president of the United States. Wertzel administered the Peabody Picture Vocabulary Test, in which the subject is shown a pictures and is asked to name activities or pastimes represented therein. Defendant scored the age equivalent of a five-year-old. After her 1999 examination of defendant, Wertzel again concluded it was "highly unlikely" that defendant ever had the ability to comprehend or waive *Miranda* rights.

Wertzel described defendant as "sort of like a child, * * * unsure of what is real and what is imagined, what is an actual memory, what is told to them." Moreover, she stated that defendant does not tolerate stress very well and is "suggestible." Wertzel described more than one instance where she was able to lead defendant in the questioning to get the information desired.

In rebuttal, the State called Assistant State's Attorney Stan Gonsalves. Gonsalves testified he went to Area One on June 25, 1993, to interview defendant. Prior to meeting defendant, detectives told Gonsalves defendant was "a little slow." Gonsalves advised defendant of her *Miranda* warnings. Gonsalves said defendant was "just quiet at that point." Defendant did not respond verbally when she was asked if she understood her rights. Defendant nodded her head affirmatively after Gonsalves finished giving her the *Miranda* warnings. Cameron was in the room, but did not say anything. Gonsalves testified that defendant was responsive to his questions during the interrogation, but he conceded that communicating with defendant was "difficult" and "slow." The record does not indicate whether Gonsalves' questions to defendant were suggestive or leading, or whether they called for a narrative response.

After hearing testimony in this matter, the circuit court rendered its ruling. The judge's initial statements indicate that he believed the issue in this case was the same as that presented in *People v. Bernasco*, 138 Ill. 2d 349 (1990), cited by defendant. The court perceived the issue as "two fold": whether defendant's statements were obtained free of police coercion, misconduct, or overreaching; and whether "a valid *Miranda* waiver must be knowing and intelligent."

Citing *Colorado v. Connelly*, 479 U.S. 157, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986), the circuit court stated that a confession is not rendered involuntary under the federal due process clause without "some police overreaching." In the circuit court's view, there was no evidence suggesting that the police had done anything to coerce the defendant to give a statement. The court ruled that defendant was not in custody until after she had confessed to Winstead; consequently, *Miranda* warnings were not required prior to that time, and any statements she

made before that point were admissible. The circuit court determined that Winstead had "gratuitously offered" defendant *Miranda* warnings on the morning of her arrest, even though the warnings were not required by the attendant circumstances. The court said there was "no dispute" that defendant was mentally handicapped, but ruled "that goes to the weight of those statements, not to whether those statements were admissible."

The court concluded that defendant *was* in custody following her statement to the Winstead and she did not knowingly and intelligently waive her *Miranda* rights. In so ruling, the court relied upon the uncontroverted testimony of Pan and Wertzel, and that of law enforcement personnel who observed defendant's actions and demeanor during periods of interrogation. The court specifically mentioned "the testimony of Winstead about how she acted and [Assistant] State's Attorney Gonsalves that she did not respond verbally [when] given her rights. She merely stood silent."

Based upon the uncontested testimony of the witnesses, the court suppressed the statement defendant made to Assistant State's Attorney Gonsalves following her arrest. The court, however, denied defendant's motion with respect to any statements made *before* defendant was in custody.

On appeal, the State posits a single issue: whether defendant's final "statement" or "confession" to Winstead-which, on the basis of the trial court's ruling, the State assumes was noncustodial-was "constitutionally voluntary because it was given without police coercion"—a second assumption based upon conclusions the trial court drew from undisputed facts. Defendant continues to argue, *inter alia,* that defendant was in custody when she gave the allegedly inculpatory statement to Detective Winstead and that she did not effectively waive her

Miranda rights. The State disputes the former contention, but not the latter.

We begin our analysis by identifying the relevant standard of review and the burden of proof A court of review will accord great deference to the trial court's factual findings, and will reverse those findings only if they are against the manifest weight of the evidence; however, the court will review *de novo* the ultimate question posed by the legal challenge to a trial court's ruling on a motion to suppress. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001); *People v. Schoening*, 333 Ill. App. 3d 28, 31-32 (2002). Where a defendant challenges the admissibility of his confession through a motion to suppress, the State has the burden of proving the confession was voluntary by a preponderance of the evidence. 725 ILCS 5/114-11(d) (West 2000); *In re G. O.*, 191 Ill. 2d 37, 49. The concept of voluntariness includes proof that the defendant made a knowing and intelligent waiver of his privilege against self-incrimination and his right to counsel. *People v. Reid*, 136 Ill. 2d 27, 54 (1990); *People v. Joya*, 319 Ill. App. 3d 370, 378 (2001).

In this case, the trial court determined that defendant was unable to effectively waive her *Miranda* rights, based upon the unrefuted testimony of the doctors who had examined her and law enforcement personnel who observed her actions and demeanor. Consequently, the trial court granted the defendant's motion to suppress as to statements allegedly made by defendant after she was formally arrested. The court denied defendant's motion with respect to her earlier statement to Winstead only because the court believed she was not 'in custody" for purposes of *Miranda* at that time. Since defendant continues to argue that she *was* in custody when she was interrogated by Winstead at the police station on June 25, 1993, we first address the custodial issue.

The determination of whether a defendant is "in custody" for *Miranda* purposes involves "two discrete inquiries * * *: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112, 133 L. Ed. 2d 383, 394, 116 S. Ct. 457, 465 (1995); *United States v. Badmus*, 325 F.3d 133, 138 (2d Cir. 2003). See also *Berkemer v. McCarty*, 468 U.S. 420, 442, 82 L. Ed. 2d 317, 336, 104 S. Ct. 3138, 3151 (1984) ("the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation"). Thus, in determining whether a person is "in custody" for purposes of *Miranda*, a court should first ascertain and examine the circumstances surrounding the interrogation, and then ask if, given those circumstances, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. *People v. Patel*, 313 Ill. App. 3d 601, 604 (2000). With respect to the latter inquiry, the accepted test is what a reasonable person, innocent of any crime, would have thought had he or she been in the defendant's shoes. *People v. Fair*, 159 Ill. 2d 51, 67 (1994), quoting *People v. Wipfler*, 68 Ill. 2d 158, 166 (1977).

When examining the circumstances of interrogation, the following factors have been found relevant in determining whether a statement was made in a custodial setting: the location, time, length, mood, and mode of the interrogation, the number of police officers present, the presence or absence of the family and friends of the accused, any indicia of formal arrest, and the age, intelligence, and mental makeup of the accused. See *People v. Lucas*, 132 Ill. 2d 399, 417 (1989); *People v. Fletcher*, 328 Ill. App. 3d 1062, 1073 (2002); *People v. Armstrong*, 318 Ill. App. 3d 607, 613 (2000); *Patel*, 313 Ill. App. 3d at 604-05; *People v. Rivera*, 304 Ill. App. 3d 124, 128 (1999); *People v. Savory*,

105 Ill. App. 3d 1023, 1028 (1982). Although it is generally irrelevant that the interrogating officer subjectively viewed the individual under questioning as a suspect, the officer's beliefs, if conveyed by word or deed to the individual being questioned, *are* relevant to the extent that they would affect how a reasonable person in the position of the individual being questioned would have gauged the breadth of his freedom of action. *Stansbury v. California*, 511 U.S. 318, 324, 128 L. Ed. 2d 293, 299, 114 S. Ct. 1526, 1529 (1994); *Patel*, 313 Ill. App. 3d at 604. Moreover, where the investigating officer is aware of particular characteristics or traits of the individual that make him or her particularly vulnerable to the impression that he or she is in custody, and the officer exploits those characteristics in questioning, that, too, is a relevant factor in determining whether the individual is "in custody" for purposes of *Miranda*. See *United States v. Erving L.*, 147 F.3d 1240, 1248 (10th Cir. 1998) (limited capacity to understand, and other particular personality traits, may be relevant to custody question where officers are aware of those traits and they influence the actions of the officers); *cf United States v. Macklin*, 900 F.2d 948, 951 (6th Cir. 1999) (no indication that the police were aware of defendants' mental deficiencies and the officers repeatedly advised defendants that they were not under arrest and did not have to answer questions).

As we consider the age, intelligence, and mental makeup of the accused-and an investigating officer's awareness and exploitation of those characteristics-in our examination of the circumstances surrounding the interrogation, so those factors are analytically intertwined with the reasonable-person prong of the custodial question. Indeed, other courts have incorporated these factors into the reasonable-person standard in varied circumstances involving investigatory interaction between the police and citizens. See *United States v. Zapata*, 997 F.2d 751,

759 (10th Cir. 1993) (notwithstanding reasonable-person standard, attributes such as age, education and intelligence of the accused have been recognized as relevant in determining whether consent was voluntary); *United States v. Little*, 18 F.3d 1499, 1505 (10th Cir. 1994) (in applying the reasonable person standard to a consent to search issue, the "particular personal traits * * * of the defendant" may become relevant * * * if the police officer knows of the personal traits or characteristics and they influence his or her conduct); *Commonwealth v. Reid*, 571 Pa. 1, 28, 811 A.2d 530, 546 (2002) (when considering whether consent was voluntarily given, a "reviewing court should evaluate the characteristics of the accused, the interaction between the accused and the police, and assess how a reasonable person in the accused's shoes would have reacted to that interaction"); *United States v. Montgomery*, 14 F.3d 1189, 1194 (7th Cir. 1994) (even when examining a noncustodial interrogation, a court should look to "the characteristics of the accused and the details of the interrogation" to determine whether a reasonable person would have felt coerced); *United States v. Cichon*, 48 F.3d 269, 276 (7th Cir. 1995) (same); *United States v. Oliver*, 142 F. Supp. 2d 1047, 1051 (N.D. Ill. 2001) (same).

The justification for incorporating general and readily discernible characteristics of the subject-actor into the reasonable-person standard logically must apply in this situation as well. If, as is the case, we are concerned with what a reasonable person "in the defendant's shoes" (see *Lucas*, 132 Ill. 2d at 418) would have thought about his or her freedom of action, the reasonable person we envision must at least wear comparable footwear; otherwise, we ought to simply abandon the legal charade that the defendant's characteristics, perspective and perception matter at all.

Recognizing this principle, the Ninth Circuit Court of Appeals has suggested the applicable standard should

indeed be modified in this context, where a juvenile is concerned, to reflect what a reasonable juvenile would have thought in defendant's position. *Alvarado v. Hickman,* 316 F.3d 841, 848 (9th Cir. 2002), *cert. granted,*___ U.S. ___ 156 L. Ed. 2d 703, 124 S. Ct. 45 (2003). In its analysis, the *Alvarado* court first recited the now firmly established legal principle that "juvenile defendants are, in general, more susceptible to police coercion than adults; as such, due process demands that a defendant's juvenile status be taken into consideration when determining the proper procedural safeguards that attach to a custodial interrogation." *Alvarado*, 316 F.3d at 843. The *Alvarado* court then reasoned, "If a juvenile is more susceptible to police coercion during a custodial interrogation, then the same juvenile is also more susceptible to the impression that he is, in fact, in custody in the first instance." *Alvarado*, 316 F.3d at 843. Next, the court seemingly sanctioned a reasonable-juvenile standard to be applied to the determination of custodial interrogation. The *Alvarado* court quoted, with special emphasis, from *Erving L.*, 147 F.3d at 1248:

> "'Given these facts, *a reasonable juvenile* in E.L.'s position would not have believed that the officers had curtailed his freedom of movement to a degree associated with formal arrest.'" (Emphasis in *original.) Alvarado*, 316 F.3d at 848, quoting *Erving L.*, 147 F.3d at 1248.

The *Alvarado* court then observed, "When we survey the landscape of state court decisions, we note that every jurisdiction that has squarely addressed the issue has ruled that juvenile status is relevant to the 'in custody' determination, either as a factor in the totality of circumstances test, or by way of *modification to the reasonable person standard*" (Emphasis added.) *Alvarado*, 316 F.3d at 850 n.5 (collecting cases). See generally *State v. Jason L.*, 129 N.M. 119, 126, 2 P.3d 856, 863 (2000) (characteris-

tics such as whether the person being questioned is a child or an adult are objective and relevant to the question of whether a reasonable person would feel free to terminate questioning and leave); *Ramirez v. State*, 739 So. 2d 568, 574 (Fla. 1999) (applying "reasonable juvenile" standard to determine whether defendant would have believed he was in custody at the time of the interrogation); *State v. Smith*, 546 N.W.2d 916, 923 (Iowa 1996) ("it is appropriate to consider the age of the defendants as an additional factor in making a determination as to custody status"); *In re D.A.R.*, 73 S.W.3d 505, 511 (Tex. Ct. App. 2002) ("We believe the facts here establish that a reasonable thirteen-year-old would have believed he was in custody"); *In re Loredo*, 125 Or. App. 390, 394, 865 P.2d 1312, 1315 (1993) (custodial question entailed inquiry into what a reasonable person of the child's age, knowledge and experience would have thought); *In re Robert H.*, 194 A.D.2d 790, 791, 599 N.Y.S.2d 621, 623 (1993) ("[A] reasonable 15-year-old, in the position of Robert, would not have believed he was free to leave the scene"); *In re Rennette B.*, 281 A.D.2d 78, 85, 723 N.Y.S. 31, 37 (2001) (same). In this context, our own appellate court has modified the reasonable person standard, where a juvenile is involved, considering what a reasonable juvenile would have thought about his or her custodial status. See *In re J.W.*, 274 Ill. App. 3d 951, 960 (1995) ("Although J.W. had not been formally arrested * * * a reasonable 14-year-old person would have been entitled to believe * * * he was in police custody and not free to leave"). See also *People v. Armstrong*, 318 Ill. App. 3d 607, 614-15.

The same rationale that requires modification of the reasonable person standard to take into account the general characteristics of juveniles also militates in favor of such a modification where the mentally retarded are concerned. "Mental retardation may have a significant impact on an individual who finds himself involved with the

criminal justice system, particularly in the context of confessions and interrogations. * * * Many mentally retarded people may be less likely to withstand police coercion or pressure due to their limited communication skills, their predisposition to answer questions so as to please the questioner rather than to answer the question accurately, and their tendency to be submissive." L. Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 Ala. L. Rev. 911, 917 (2001). See also P. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 Va. L. Rev. 1471, 1473 (1995) ("Mentally retarded persons are more susceptible to coercion, more likely to confess falsely, and less likely to understand their rights than people of normal intellectual ability"). Just as they are more susceptible to police coercion during a custodial interrogation, the mentally retarded are also more susceptible to the impression that they are, in fact, in custody in the first instance. The circumstances of the instant case amply demonstrate the point.

Including the initial interrogation of June 25, 1993, defendant was questioned by police six times before she was formally arrested: four times at a police facility, once at her home and once at the scene of the crime. The police enlisted the aid and consent of Cameron-who apparently represented herself to be defendant's sister and legal guardian-in order to question defendant. Cameron acted as a translator of sorts and actually facilitated the police interrogation. Her role in the process of interrogation is not what we characterize as that of a family member concerned with defendant's welfare. It is not evident from the record that defendant ever verbally assented to police interrogation. On every occasion that she was questioned outside her home, the police transported defendant. Two detectives were always present during the interrogations.

Although it is not clear from the record whether defendant was present when Winstead advised Cameron that defendant was a suspect, even a mentally retarded suspect might well have regarded herself as such after Winstead had expressed disbelief of her version of events and had asked her to take a polygraph examination. We also note that Winstead for the first time read defendant her *Miranda* rights on June 25, something he had not done in previous encounters. We have no doubt whatsoever that a reasonable person with defendant's mental capacity would have believed he or she was in custody and not free to leave the police station.

In fact, our research has disclosed a case involving similar circumstances, a person of apparently *normal* intelligence, and a determination that the interrogation *was* custodial. In *United States v. Wauneka*, 770 F.2d 1434 (9th Cir. 1985), defendant was questioned by law enforcement officials on four occasions, three on the day of his confession. On the first three, he was transported from his residence to a Bureau of Indian Affairs office by plain clothes agents. When he was picked up the last time for further questioning, Wauneka was transported by two armed officers and was placed in a large conference room with four or five officers who each had an opportunity to question him. The hour-long interrogation eventually turned accusatory. During a break, Wauneka, who was then 18 years old, broke down crying. FBI agents resumed the questioning despite the fact that Wauneka was visibly shaken by this ordeal and eventually obtained a confession. Wauneka had no means of transportation, and he was never offered an opportunity to leave the Bureau's office prior to his confession. On these facts, the court of appeals upheld a district court ruling that Wauneka was "in custody" for purposes of *Miranda* when he confessed. The court stated, "A reasonable innocent person in such circumstances probably would have concluded that

he was not free to leave." *United States v. Wauneka*, 770 F.2d 1434, 1438-39 (9th Cir. 1985).

Like Wauneka, the defendant in this case was repeatedly taken by officers to a law enforcement facility and questioned. As in *Wauneka*, the instant defendant was never told she could leave the station when she wished; she was taken home by the police when they were finished with her. By the time of the encounter on June 25, the atmosphere of the interrogation had turned accusatory: defendant had taken a polygraph examination and had been designated a suspect by Winstead. However, defendant, unlike *Wauneka*, is mentally retarded. She was only at the police station because her purported guardian/sister agreed to police requests that she accompany them there. Her options, no doubt, seemed very limited indeed.

Under the circumstances, a reasonable person with defendant's mental capacity would not have felt free to leave. In this case, the police knowingly exploited defendant's mental retardation. While the custody inquiry may not "place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question" *(Berkemer*, 468 U.S. at 442 n.35, 82 L. Ed. 2d at 336 n.35, 104 S. Ct. at 3151 n.35), neither does it sanction the exploitation of known frailties or idiosyncracies by the government. Modification or refinement of the reasonable person standard is appropriate where, as here, such exploitation has occurred. We conclude that the circuit court erred in ruling defendant. was not in custody when she allegedly gave an inculpatory statement to Detective Winstead on June 25, 1993.

Having determined that Winstead's interrogation of defendant on June 25 was custodial, we now address the question of whether defendant knowingly and intelligently waived her *Miranda* rights. Custodial interrogation is, of course, inherently coercive and "'trades on the weakness

of individuals.'" *Dickerson v. United States*, 530 U.S. 428, 435, 147 L. Ed. 2d 405, 414, 120 S. Ct. 2326, 2331 (2000), quoting *Miranda v. Arizona*, 384 U.S. 436, 455, 16 L. Ed. 2d 694, 712, 86 S. Ct. 1602, 1618 (1966). As we have noted previously herein, it is generally recognized that the mentally retarded are considered more susceptible to police coercion or pressure than people of normal intellectual ability, they are predisposed to answer questions so as to please the questioner rather than to answer accurately, they are more likely to confess to crimes they did not commit, they tend to be submissive, and they are less likely to understand their rights. See M. McCloud, *Words Without Meaning: The Constitution, Confessions and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495, 503, 538 (2002); L. Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 Ala. L. Rev. 911, 917 (2001). P. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 Va. L. Rev. 1471, 1473 (1995).

However, evidence of a defendant's limited mental or intellectual capacity at the time of a confession, alone, does not establish that he or she was incapable of waiving *Miranda* rights. Limited intellectual capacity is one of several factors to be considered in this regard. *People v. Foster*, 168 Ill. 2d 465, 476 (1995); *People v. Mahaffey*, 165 Ill. 2d 445, 462 (1995).

Nevertheless, "waiver of a constitutional right is valid only if it is clearly established that there was 'an intentional relinquishment or abandonment of a known right * * *.'" *People v. Johnson*, 75 Ill. 2d 180, 187 (1979), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L Ed. 1461, 1466, 58 S. Ct. 1019, 1023 (1938). See *People v. McClanahan*, 191 Ill. 2d 127, 137 (2000). Waivers must not only be voluntary, but must be knowing and intelli-

gent acts in the sense that they are done with sufficient awareness of the relevant circumstances and likely consequences. *McClanahan*, 191 Ill. 2d at 137; *Bernasco*, 138 Ill. 2d at 364-65.

A valid waiver of *Miranda* rights must be knowingly and intelligently made. *Bernasco*, 138 Ill. 2d at 364-65. A criminal suspect is not required to know and understand every possible consequence of a waiver of the *Fifth Amendment* privilege for it to be knowingly and intelligently made. *Colorado v. Spring*, 479 U.S. 564, 574, 93 L. Ed. 2d.954, 966, 107 S. Ct. 851, 857 (1987). However, in order to effect an intelligent and knowing waiver of *Miranda* rights, a defendant must have"'"a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."'"Bernasco, 138 Ill. 2d at 360, quoting *Patterson v. Illinois*, 487 U.S. 285, 292, 101 L. Ed. 2d 261, 272, 108 S. Ct. 2389, 2395 (1988). The defendant need not understand far-reaching legal and strategic effects of waiving his or her rights or appreciate how widely or deeply an interrogation may probe; however, the defendant must at least understand basically what those rights encompass and minimally what their waiver will entail. *Mahaffey*, 165 Ill. 2d at 462, quoting *Bernasco*, 138 Ill. 2d at 363. Whether a waiver is knowing and intelligent is determined by the particular facts and circumstances of the case, "including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. at 464, 82 L. Ed. at 1466, 58 S. Ct. at 1023; *In re J.J.C.*, 294 Ill. App. 3d 227, 233 (1998).

It is all too obvious, as the trial court concluded, that the defendant in this case did not knowingly and intelligently waive her *Miranda* rights. The State does not even attempt to argue that point. Winstead advised defendant of her *Miranda* warnings from a standard form without additional explanation. Defendant made no verbal response; she merely nodded her head in an affirmative manner.

Winstead later recalled that Cameron told defendant something to the effect of: "He's telling you that you don't have to talk to me and that you're not going to be in trouble or something." Defendant nodded her head in agreement and "seemed to understand what her sister was saying." Defendant never verbally indicated that she understood, and she did not sign a waiver form. Indeed, it is unclear to what extent defendant ever responded to, or communicated with, Winstead. He acknowledged that Cameron "initially" acted as an "interpreter," and it is obvious from his testimony that she was still acting in that capacity on June 25, 1993, despite Winstead's suggestion to the contrary: "After a while, after I talked to [defendant] somewhat, I could begin to understand or she'd answer me or she wouldn't." That statement is hardly a testament to an acceptable level of communication and understanding between Winstead and defendant. The record does not indicate whether Winstead's questions to defendant were suggestive or leading, or whether they called for a narrative response.

Assistant State's Attorney Gonsalves testified that he advised defendant of her *Miranda* warnings, and she was "just quiet at that point." Defendant did not respond verbally when she was asked if she understood her rights. Defendant simply nodded her head affirmatively after Gonsalves finished giving her the *Miranda* warnings. Cameron was in the room, but did not say anything. Gonsalves testified that defendant was responsive to his questions during the interrogation, but he conceded that communicating with defendant was "difficult" and "slow." The record does not indicate whether Gonsalves' questions to defendant were suggestive or leading, or whether they called for a narrative response. It does not appear from the record that defendant had any prior experience with the criminal justice system.

Dr. Philip Pan characterized defendant's mental impairment as moderate mental retardation. He determined her condition was profound to a degree that she was unfit to stand trial. He noted that four other psychiatrists had reached the same conclusion. Pan rendered his opinion that defendant was incapable of understanding *Miranda* warnings. He noted that her thinking was "idiosyncratic," meaning she was often "not on the same page" as the person questioning her. She would frequently answer questions in a completely irrelevant manner.

Dr. Linda Wertzel, a clinical psychologist, examined defendant in 1994 and testified to her findings. Wertzel concluded that defendant was mentally retarded with an IQ of 54. Wertzel stated that defendant could provide only "simple answers to direct questions and really did not provide a narrative of information." Defendant functioned, mathematically, at a kindergarten level. Defendant was unsure if she F had ever gone to school. She could not read or write. Wertzel determined that defendant could only express herself at a "very simple childish level" and she could not comprehend more than a one-step command. Defendant's comprehension of her circumstances was marginal, and she was unable to understand her *Miranda* rights.

Wertzel examined defendant again in October of 1999 and concluded defendant remained unable to understand her *Miranda* warnings. Wertzel then administered the Peabody Picture Vocabulary Test to defendant. Defendant scored the age equivalent of a five-year-old. After her 1999 examination of defendant, Wertzel determined it was "highly unlikely" that defendant ever had the ability to comprehend or waive *Miranda* rights. Wertzel described defendant as "sort of like a child, * * * unsure of what is real and what is imagined, what is an actual memory, what is told to them." Moreover, she stated that defendant does not tolerate stress very well and is "suggestible."

Wertzel described more than one instance where she was able to lead defendant in the questioning to get the response desired.

The uncontroverted testimony in this case demonstrates that defendant did not knowingly and intelligently waive her *Miranda* rights. No other conclusion is possible based on the evidence adduced at the suppression hearing. Defendant was subjected to repeated interrogation that was actually *facilitated* by her purported sister/guardian. By repeatedly taking defendant where they wanted, when they wanted, the police reinforced their authority and control over her. Defendant apparently had no prior experience with the criminal justice system. She was clearly a suspect by the time she took a polygraph test and was thereafter questioned on June 25, 1993. The experts who testified were unanimously of the opinion that defendant was incapable of understanding and waiving her *Miranda* rights. Aside F from the State's testimony regarding defendant's ambiguous nods, there was no evidence even suggesting that defendant waived her rights. In fact, the minimal level of communication between law enforcement officials and the defendant throughout the investigation of this case is a matter of great concern to this court and should have been to the officers involved, who proceeded to repeatedly question defendant despite her obvious impairment and vulnerability. We note that the degree of defendant's mental impairment is comparable to that of the defendants in *Bernasco* and *People v. Robinson*, 301 Ill. App. 3d 634 (1998). In both cases, confessions were suppressed. *Bernasco*, 138 Ill. 2d at 350-51; *Robinson*, 301 Ill. App. 3d at 643.

It has been said that "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." *Escobedo v.*

Illinois, 378 U.S. 478, 488-89, 12 L. Ed. 2d 977, 985, 84 S. Ct. 1758, 1764 (1964). Custodial interrogation trades on the weakness of individuals (*Dickerson*, 530 U.S. at 435, 147 L. Ed. 2d at 414, 120 S.Ct. at 2331, quoting *Miranda*, 384 U.S. at 455, 16 L. Ed. 2d at 712, 86 S. Ct. at 1618); the young and mentally infirm are most vulnerable. The potential for abuse is obvious, as is the need for adequate safeguards. We believe this case amply demonstrates the point.

Both confessions defendant allegedly gave on June 25, 1993, were made under circumstances custodial in nature. As defendant was incapable of knowingly and intelligently waiving her *Miranda* rights, both statements should have been suppressed. We express no opinion regarding the admissibility of statements defendant may have made prior to that date. The State's argument on appeal concerns only defendant's "confession to the detectives." We, therefore, affirm the judgment of the appellate court insofar as we reverse and remand for further suppression proceedings and a new discharge hearing. We modify the appellate court's judgment to the extent that we limit the scope of any further suppression proceedings to statements defendant may have made prior to June 25, 1993.

Given our disposition, we need not reach the issue upon which the appellate court disposed of this case. We may affirm the result below on any basis that is supported by the record. *People v. Huff*, 195 Ill. 2d 87, 91 (2001); *In re Application of the Cook County Treasurer*, 185 Ill. 2d 428, 436 (1998).

For the reasons stated, we affirm the judgment of the appellate court as modified and remand to the circuit court for further proceedings consistent with this opinion.

Affirmed as modified;
cause remanded

FIFTH DIVISION
November 8, 2002

No. 1-01-0110

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County
v.	)	
MARY BRAGGS, Defendant-Appellant.	)	Honorable Stanley Sacks, Judge Presiding.

JUSTICE QUINN delivered the opinion of the court:

Defendant, Mary Braggs, was charged by indictment with two counts of first degree murder for the deaths of Connie Hall and Donald Rudolph. The initial trial court refused to conduct a hearing on defendant's motion to suppress statements. The trial court subsequently found defendant unfit to stand trial and a discharge hearing was held. At that hearing, the trial court found that the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt and remanded defendant to the Department of Mental Health and Development Disabilities (Department of Mental Health) for a period of five years.

On appeal, this court held that the trial court erred when it refused to conduct a hearing on defendant's motion to suppress and directed the trial court to conduct a hearing on remand. *People v. Braggs*, 302 Ill. App. 3d 602 (1998). This court additionally held that the evidence was sufficient

to establish guilt beyond a reasonable doubt for purposes of the discharge hearing.

On remand, the trial court conducted a hearing on defendant's motion to suppress and, in finding that defendant was not mentally competent to waive her *Miranda* rights, granted defendant's motion with respect to the statements made to the assistant State's Attorney following defendant's arrest. The trial court did not suppress defendant's statement made to detectives shortly after she arrived at the police station. The trial court held that a new discharge hearing was not necessary and reinstated the original order committing defendant to the Department of Mental Health. Defendant now appeals.

On appeal, defendant argues that the trial court improperly denied her motion to suppress in that her statements were not voluntary. Defendant additionally argues that the trial court erred in refusing to hold a new discharge hearing.

For the following reasons, we reverse and remand.

I. BACKGROUND

On July 23, 1993, defendant was indicted on two counts of first degree murder. On June 20, 1996, the initial trial court, after refusing to conduct a hearing on defendant's motion to suppress statements, found defendant unfit to stand trial. The trial court found that defendant, in all probability, would remain unfit indefinitely in light of her mental retardation. The trial court subsequently held a discharge hearing pursuant to Section 104-25 of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-25 (West 1996)). At that hearing, a Chicago police detective testified that on July 25, 1993, after he advised defendant of her *Miranda* warnings, defendant told him that she and Connie Hall were in an apartment together on April 28, 1993, when

Donald Rudolph returned. Rudolph was drunk and struck both defendant and Hall. Defendant then knocked Rudolph down and he struck his head. Hall became upset, accusing defendant of killing Rudolph, and defendant then stabbed Hall a number of times in her upper body. The trial court found this evidence sufficient to establish defendant's guilt beyond a reasonable doubt. Defendant was remanded to the Department of Mental Health for a period of five years.

Defendant appealed. On appeal, we remanded the matter for a hearing on defendant's motion to suppress, holding that the trial court erred in refusing to conduct the hearing. *Braggs*, 302 Ill. App. 3d at 606. We also held that the evidence introduced against defendant, when viewed in its aspect most favorable to the State, was sufficient to establish her guilt beyond a reasonable doubt for purposes of the discharge hearing.

On remand, the following evidence was introduced at the hearing on the motion to suppress statements. Chicago police detective Edward Winstead testified that he was assigned to investigate the deaths of Donald Rudolph and Connie Hall. The victims' bodies were both found in a first-floor apartment located on South Prairie Avenue in Chicago on April 28, 1993. Hall died as a result of multiple stab wounds. Rudolph died as a result of strangulation. During the course of the investigation, Winstead began looking for defendant. On May 7, 1993, Survilla Cameron, defendant's sister and guardian, contacted Winstead and informed him that defendant lived with her. Winstead transported defendant and Cameron to Area One and questioned her. Cameron informed Winstead that defendant was mentally incompetent. Defendant was not advised of her *Miranda* rights. Winstead testified he had difficulty communicating with defendant, that "sometimes she wouldn't answer" questions, and that she was "very slow in answering."

Winstead testified that, in summary, defendant told him that she was in the apartment when two black males came to the door. Defendant heard an argument and hid in the closet. When she came out, defendant saw Hall dead in the bedroom. Defendant said Hall had been stabbed and was wearing white. Defendant said Rudolph was in the front room and that he had been hit in the head with a wrench and had been strangled to death. Winstead testified that defendant's description was "very accurate as to how the victims died and where they were found." Winstead then took defendant and Cameron home.

On the morning of May 9, Winstead questioned defendant at Cameron's apartment with Cameron present. Defendant said that one of the men was named Ron and that he was a friend of Cleo's. Defendant described the other man as a tall black male. Winstead testified that the investigation revealed Ron Thomas was an acquaintance of Cleo and the victims, and when Winstead located him he was with a tall black male named Mike. Later that same afternoon, Winstead picked up defendant and Cameron and took them to Area One. Winstead, in the company of Cameron, showed defendant photographs of Ron Thomas and Mike. Defendant quickly identified the photograph of Mike as being the tall black male. At first she was uncertain of the identity of Ron Thomas, then she was certain it was him. Winstead testified that when he informed defendant the men were at the police station, defendant changed her story. Defendant then said that these were not the two men who came to the apartment and that it was two different men. Defendant said two guys came to the door and she hid in the closet.

Winstead testified that on that same afternoon he took defendant and Cameron to the scene of the crime. Defendant pointed out where the two bodies were found. Winstead testified that her account was consistent with where the bodies were found by the police. Defendant then

pointed out the closet she hid in. Upon examining the closet, Winstead testified that defendant "couldn't have possibly fit in there." Winstead then took defendant and Cameron home.

On May 12 Winstead transported defendant and Cameron to the polygraph unit of the Chicago police department. Although defendant was cooperative, the polygraph examination was inconclusive because defendant did not register enough emotion. Again, defendant was returned to Cameron's apartment. Cameron and defendant subsequently moved residences.

On June 25, 1993, at around noon, Winstead picked up defendant and Cameron from their new apartment and took them to Area One for questioning. Prior to the questioning, Winstead informed Cameron the police were now looking at defendant as a potential suspect. Winstead, another detective, defendant and Cameron were present in the interview room. Winstead advised defendant of her *Miranda* warnings, to which defendant nodded her head in an affirmative manner. Following an hour-long interview, defendant was placed under arrest. An assistant State's Attorney arrived and again advised defendant of her *Miranda* warnings.

Dr. Philip Pan, a psychiatrist, testified for the defense. On May 16, 1996, Pan diagnosed the defendant as having moderate mental retardation and being unfit to stand trial. Pan testified it was not likely she could be restored to fitness any time in the near future. On August 31, 1999, Pan again evaluated defendant. Pan opined that defendant was incapable of understanding *Miranda* warnings. Dr. Pan further testified that defendant could give simple answers to questions she understood but she was not capable of abstract thinking. Dr. Pan explained that this meant defendant was unable to think about the higher meaning something may have. Defendant told Dr.

Pan she was 29 years old when in reality she was 56. Dr. Pan also testified that defendant was unfit for trial and would not become fit in the future.

Dr. Linda Wertzel, a clinical psychologist, also testified for the defense. On May 21, 1994, Wertzel examined defendant and concluded she was mentally retarded with an I.Q. of 54. Wertzel concluded defendant mathematically functioned at a kindergarten level. Wertzel also concluded that defendant was unable to understand her *Miranda* rights. Wertzel examined defendant again in October 1999 and concluded she remained unable to understand her *Miranda* warnings. Dr. Wertzel testified that the defendant was emotionally blunted and passive. She was illiterate and was only able to express herself at a very simple, childish level. Defendant had a limited ability to comprehend more than a one-step command. Defendant was unable to cooperate with her attorney.

In rebuttal, the State called Assistant State's Attorney (ASA) Stan Gonsalves. Gonsalves testified he went to Area One on June 25, 1993, to interview defendant. Prior to meeting defendant, detectives told Gonsalves defendant was a little slow. Gonsalves advised defendant of her *Miranda* warnings. Defendant did not respond verbally when she was asked if she understood her rights individually. Defendant nodded her head affirmatively after Gonsalves finished giving her the *Miranda* warnings.

Following the hearing, the trial court, in an 11-page finding, first determined that the issue facing the court was two fold: whether defendant's statement was obtained free of coercion or misconduct; and whether defendant's waiver of her *Miranda* rights was "knowing and intelligent." The court found that there was not even a suggestion that the police had done anything to coerce the defendant to give a statement. The trial court also found defendant was not in custody until after she confessed to

Winstead, and therefore, any statements she made before that point were admissible. The trial court found that Winstead "gratuitously offered" defendant her *Miranda* warnings on the morning of her arrest even though the warnings were not needed. The trial court found that defendant was in custody following her statement to the police and that she did not knowingly and intelligently waive her *Miranda* warnings. In doing so, the court relied upon the testimony of Dr. Pan and Dr. Wertzel. The court also relied upon "the testimony of Winstead about how she acted and [Assistant] State's Attorney Gonsalves that she did not respond verbally [when] given her rights. She merely stood silent." The court found that defendant was mentally handicapped and then held "that goes to the weight of those statements, not to whether those statements were admissible." Therefore, the court denied defendant's motion with respect to any statements made before defendant was in custody, but suppressed the statement made to ASA Gonsalves following her arrest.

Defendant's motion to reconsider was denied. The trial court then ruled that the original order of June 27, 1996, committing defendant to the Department of Mental Health, should stand. In recognizing the appellate court's instruction that "in the event that motion [motion to suppress] is granted and the statements of defendant are suppressed, the circuit court shall conduct a new discharge hearing." (*Braggs*, 302 Ill. App. 3d at 607), the trial court held that a new discharge hearing was unnecessary. The testimony at the previous discharge hearing only involved defendant's unsuppressed statement to the police. Defendant's statement to Gonsalves was not introduced at the discharge hearing. Therefore, the trial court reasoned that the evidence would be the same and a new hearing would be unnecessary. Defendant now appeals.

II. ANALYSIS

We review the ultimate question of whether a confession is voluntary *de novo*, but we accord great deference to the trial court's factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence. *In re G.O.*, 191 Ill. 2d 37, 49-50 (2000).

In denying defendant's motion to suppress, the trial court relied upon *Colorado v. Connelly*, 479 U.S. 157, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986). In *Connelly*, the defendant approached a uniformed police officer in downtown Denver on August 18, 1983. Connelly told the officer that he had murdered someone and he wanted to talk about it. The officer gave Connelly his *Miranda* rights. Connelly said he understood his rights and he would talk to the officer because his conscience had been bothering him. A detective arrived and he again advised Connelly of his *Miranda* rights. Connelly said he had come all the way from Boston to confess to the murder of Mary Ann Junta, a young girl he had killed in Denver in November 1982. A search of police records revealed that the body of an unknown female had been found in April 1983. Connelly readily agreed to take the police to the scene of the killing. He pointed out the exact location of the murder. The police testified that Connelly appeared to fully understand the nature of his acts and they did not perceive any indication that Connelly was suffering from any kind of mental illness.

When Connelly was interviewed by the public defender the next morning, he appeared to be disoriented. He gave confused answers to questions and said that "voices" had told him to come to Denver and that he had confessed because the voices told him to. Connelly was initially found incompetent to assist in his own defense, but by March 1984, doctors found him competent to stand trial. In a preliminary hearing, defendant moved to suppress all his statements. A psychiatrist testified that defendant was

suffering from chronic schizophrenia and was in a psychotic state at least as of the day before he confessed. The psychiatrist testified that, in his expert opinion, defendant was experiencing "command hallucinations." *Connelly*, 479 U.S. at 161, 93 L.Ed.2d 473, 107 S.Ct. at 519. This condition interfered with his ability to make "free and rational choices." *Connelly*, 479 U.S. at 157, 93 L.Ed.2d 473, 107 S.Ct. at 517. He further testified that Connelly's illness did not significantly impair his cognitive abilities. Thus, defendant understood his rights when the police gave them.

The Colorado Supreme Court affirmed the trial court's suppression of the defendant's statements. *People v. Connelley*, 702 P.2d 722 (Colo. 1985). The court found that the admission of the confession in a court of law was sufficient state action to implicate the due process clause of the fourteenth amendment. The court held "the absence of police coercion or duress does not foreclose a finding of involuntariness. One's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure." *Connelly*, 702 P.2d at 728. As Connelly's initial statement was not the product of a rational intellect and a free will, it was properly suppressed. Further, Connelly's mental condition precluded his ability to make a valid waiver of his constitutional rights. Therefore, his statement made while in custody was also properly suppressed. *Connelly*, 702 P.2d at 729.

The United States Supreme Court first reversed the Colorado Supreme Court's holding that Connelly's confession violated due process.

> "Respondent would now have us require sweeping inquiries into the state of mind of a criminal defendant who has confessed, inquires quite divorced from any coercion brought to bear on the defendant by the State. We think the Constitution rightly leaves this sort of

> inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area. A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, see, *e.g.*, Fed. Rule Evid. 601, and not by the Due Process Clause of the Fourteenth Amendment. 'The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.' *Lisenba v. California*, 314 U. S. 219, 236, 86 L. Ed. 166, 180, 62 S. Ct. 280, 290] (1941).
>
> We hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment. We also conclude that the taking of respondent's statements, and their admissions into evidence, constitute no violation of that Clause." *Connelly*, 479 U.S. at 166-67, 93 L. Ed. 2d at 484, 107 S. Ct. at 521-22.

The Supreme Court next considered whether Connelly's waiver of his constitutional rights was valid. The State conceded at oral argument that when Connelly was handcuffed, the custody requirement of *Miranda* was satisfied. In reversing the Colorado Supreme Court's suppression of the statements made by Connelly after he was in custody, the Supreme Court held:

> "The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion. See *United States v. Washington*, 431 U. S. 181, 187, 52 L. Ed. 2d 238, 245, 97 S. Ct. 1814, 1818] (1977); *Miranda*, [348 U. S., at 460, 16 L. Ed. 2d at 715, 86 S. Ct. at 1620]. Indeed, the Fifth Amendment privilege is not concerned 'with moral and psychological pres-

> sures to confess emanating from sources other than official coercion.' *Oregon v. Elstad*, 470 U. S. 298, 305, 84 L. Ed. 2d 222, 229, 105 S. Ct. 1285, 1290] (1985). The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Connelly*, 479 U.S. at 170, 93 L. Ed. 2d at 486, 107 S. Ct. at 523.

The Supreme Court continued, "Respondent's perception of coercion flowing from the 'voice of God,' however important or significant such a perception may be in other disciplines, is a matter to which the United States Constitution does not speak." *Connelly*, 479 U.S. at 170-71, 93 L. Ed. 2d at 487, 107 S. Ct. at 523-24.

In basing its ruling on *Connelly*, the trial court focused on its penultimate holding: for a confession to be "involuntary" under the due process clause, there must be coercive police activity. In doing so, the trial court did not address *Connelly*'s instruction that inquiries into the state of mind of a criminal defendant who has confessed are to be resolved by state laws governing the admission of evidence: "A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum." *Connelly*, 479 U.S. at 167, 93 L. Ed. 2d at 484, 107 S. Ct. at 521-22.

The Illinois Supreme Court addressed the admissibility of confessions made by persons with special needs many decades prior to *Connelly* being decided. In *People v. Klyczek*, 307 Ill. 150 (1923), the court considered the admissibility of the confession of a 16-year-old-Polish youth who averred that he did not understand the questions he was asked and that the confession written by the police was never read to him. The court held:

> "The situation in which the plaintiff in error was placed and the circumstances surrounding him at the time were proper to be taken into consideration by the court in determining the competency of the confession, including his youth and inexperience, his character, his intelligence, his strength of intellect, his knowledge or ignorance, and the fact that he was detained in prison and was interrogated by the police officer who held him in custody. *** The question of admissibility is finally whether, considering all the circumstances of this particular case, they were such that the statement of the plaintiff in error might have been induced by their influence to make a false confession." *Klyczek*, 307 Ill. at 154-55.

In *People v. Lambersky*, 410 Ill. 451 (1951), the supreme court considered the admissibility of a murder confession made by a defendant who had resided at the "Dixon State Hospital for mentally deficient persons, having been adjudicated feeble-minded by the circuit court of Cook County about thirteen years prior thereto." *Lambersky*, 410 Ill. at 453. The court held that confessions "involve a waiver of the constitutional right against self-incrimination and an intentional relinquishment of a known right. As an insane person cannot know of his constitutional rights, his confession is regarded as a nullity and cannot be treated as evidence against him. (*People v. Shroyer*, 336 Ill. 324 [(1929)])." *Lambersky*, 410 Ill. at 455.

In *People v. Hester*, 39 Ill. 2d 489 (1968), the court reviewed the admissibility of a murder confession made by a 14 year old whose mental age and abilities would have been approximately those of an 11 year old at the time he confessed. The court held:

> "The general rule is that subnormal mentality does not *ipso facto* make a confession involuntary 'so long as the subnormality has not deprived the person in question

> of the capacity to understand the meaning and effect of the confession. But mental subnormality is a factor to be considered in determining the issues of voluntariness and admissibility, and, where accompanied by other factors indicative of an absence of voluntariness, will require that the confession be excluded.' (Annot., 69 A.L.R. 2d 348, 350; see *State v. Ordog*, 45 N.J. 347, 212 A.2d 370, 377; *People v. Lara*, 62 Cal. Rptr. 586, 601.)" *Hester*, 39 Ill. 2d at 500.

Hester's holding that a nontreating defense psychiatric expert could not give an opinion based upon statements made to him by the accused because of the self-serving nature of the statements was overturned by *People v. Anderson*, 113 Ill. 2d 1, 13 (1986). However, *Hester* has been cited as good law as recently as *People v. Wiley*, No. 86557, slip op. at 9-10 (October 25, 2001).

In *People v. Turner*, 56 Ill. 2d 201 (1973), the court considered the admissibility of a murder confession made by a person who lived at the Polk State School for mentally retarded children from the time he was 8 until he escaped at the age of 18. The court said:

> "This court has long recognized that the mental capacity of a defendant must be taken into consideration in determining whether his actions were voluntary (*People v. Klyczek*, 307 Ill. 150, 155) and while mental deficiency, of itself, does not render a confession involuntary (*People v. Hester*, 39 Ill.2d 489) it is a factor which must be considered in the totality of the circumstances under which the right to counsel was waived *or a statement or confession made*." (Emphasis added.) *Turner*, 56 Ill. 2d at 206.

Turner cites *Hester* for the proposition that "mental deficiency, of itself, does not render a confession involuntary." This leaves out the accompanying phrase, "so long as the subnormality has not deprived the person in ques-

tion of the capacity to understand the meaning and effect of the confession." *People v. Hester*, 39 Ill. 2d at 500. The *Turner* court based its suppression of the defendant's confession on its finding that the defendant did not make an intelligent and knowing waiver of his rights and that defendant told the polygraph examiner that he wanted a lawyer before he confessed. *Turner*, 56 Ill. 2d at 207. Consequently, the fact that the *Turner* court left out the additional language from *Hester* does not indicate that the court disagreed with the proposition that, where mental deficiency deprives a person of the capacity to understand the meaning and effect of his ir her confession, that confession may be involuntary.

In *People v. Simmons*, 60 Ill. 2d 173, 181 (1975), the court cited the above language in *Turner* in reversing and remanding a trial court's denial of a motion to suppress the confession of a 16 year old who was "borderline mentally retarded." The court also held:

> "Whether a statement was voluntarily given must be determined from 'the totality of the circumstances' (*People v. Prim*, 53 Ill.2d 62, 70) and consideration must be given to 'both the characteristics of the accused and the details of the interrogation.' *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 36 L. Ed. 2d 854, 862, 93 S. Ct. 2041, 2047." *Simmons*, 60 Ill. 2d at 179.

The court also held that when considering whether a juvenile's confession is admissible, "'the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.'" *Simmons*, 60 Ill. 2d at 18, quoting *In re Gault*, 387 U.S. 1, 55, 18 L. Ed. 2d 527, 561, 87 S. Ct. 1428, 1458 (1967).

Our supreme court considered this long line of its precedent and the holding in *Connelly* in the seminal case of

People v. Bernasco, 138 Ill. 2d 349 (1990). In *Bernasco*, the defendant was 17 years old and a psychologist testified that he could not understand *Miranda*, warning. The trial court found that "though the confession was not coerced or otherwise the product of improper police conduct, and though the confession was preceded by *Miranda* warnings [citation], defendant's intelligence level was so low that his *Miranda* waiver and his confession were neither voluntary nor knowing." *Bernasco*, 138 Ill. 2d at 351. In analyzing *Connelly*, the court said:

> "*Connelly* merely means that, in general, issues of intelligent knowledge are separate from issues of voluntariness. The *Connelly* opinion was actually addressing (1) an initial confession given under circumstances requiring no *Miranda* warning (hence involving no question of waiver), the voluntariness of the confession being at issue, and (2) subsequent confessions given after *Miranda* warnings, the voluntariness of the *Miranda* waivers being at issue. Thus—in a narrower vein than that in which the opinion's opening sentences might cursorily be read—the Court continued that, in determining whether a confession is voluntary where there has been no official coercion, inquiries into the state of a confessing defendant's mind, when 'divorced from any coercion *** by the State,' are to be resolved by State evidence law rather than by the due process clause of the fourteenth amendment. (*Connelly*, 479 U.S. at 166-67, 93 L. Ed. 2d at 484, 107 S. Ct. at 522.)." (Emphasis omitted.) *Bernasco*, 138 Ill. 2d at 356.

Significantly, the *Bernasco* court said that the State evidence rules to be applied considered the reliability of the statement, a consideration we will address later. *Bernasco*, 138 Ill. 2d at 353. The court addressed Illinois precedent as follows:

"Independently of *Miranda* and its Federal voluntariness principles, Illinois courts have long held that, to be admissible, a confession must be 'voluntary' in a State-law sense and that a defendant's mental ability, familiarity with the English language, age, education, and experiences are among factors to be weighed in determining from the totality of the circumstances *whether a confession* or waiver of rights is 'voluntary' in that sense. (See *People v. Turner*, 56 Ill. 2d at 206; *People v. Hester* (1968), 39 Ill. 2d 489, 497-98; *People v. Cocroft* (1967), 37 Ill. 2d 19, 22; *People v. Earl* (1966), 34 Ill. 2d 11, 15) (Insanity treated as a categorical exception under Illinois law, the confession of an insane person is involuntary *per se*. (*People v. Lambersky* (1951), 410 Ill. 451, 455; *cf.* 33 Vill. L. Rev. at 903-05 (collecting similar State and pre-*Connelly* Federal holdings).)) In their holdings under State law, Illinois courts in effect have treated intelligent knowledge as one component of a confession's overall voluntariness, rather than as an admissibility criterion separate from voluntariness as in *Miranda* waiver law. (See also Ill. Rev. Stat. 1989, ch. 38, par. 114-11 (governing motions to suppress confessions as involuntary).) The line of *Miranda* cases represented by *Burbine*, *Connelly*, *Spring*, and *Patterson* has now seemingly settled, for Federal constitutional purposes, that voluntariness and intelligent knowledge are separate questions; however, *for purposes of our own evidence law they are interrelated*." (Emphasis added.) *Bernasco*, 138 Ill. 2d at 365.

The clear import of the above language is that Illinois courts must consider intelligent knowledge as a component of a confession's overall voluntariness independently of *Miranda*. Consequently, courts must consider whether a statement was made with intelligent knowledge even in those instances where *Miranda* does not apply. This proposition is further supported by other language in

Bernasco: "We now turn to the question whether the manifest weight of the evidence contradicts the trial court's finding that defendant did not waive his *Miranda* rights *or give his confession knowingly and intelligently*." (Emphasis added.) *Bernasco*, 138 Ill. 2d at 367.

Our supreme court addressed the issue of whether a mentally handicapped juvenile's confession was admissible in *In re W.C.*, 167 Ill. 2d 307 (1995). The court stated:

> "For a defendant's confession to be admitted at trial, the State must first prove by a preponderance of the evidence that the defendant validly waived his privilege against self-incrimination and his right to counsel. (See *People v. Reid* (1990), 136 Ill. 2d 27, 56). To be valid, the waiver must reflect an intentional relinquishment or abandonment of a known right or privilege. The accused must possess a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. (See *People v. Bernasco* (1990), 138 Ill. 2d 349, 360 * * *). To waive rights intelligently and knowingly, one must at least understand basically what those rights encompass and minimally what their waiver will entail. The mental state that is necessary to validly waive *Miranda* rights involves being cognizant at all times of the State's intention to use one's statements to secure a conviction and of the fact that one can stand mute and request a lawyer. See *Bernasco*, 138 Ill. 2d at 360.
>
> Whether a defendant intelligently waived his right to counsel depends, in each case, on the particular facts and circumstances of that case, including the defendant's background, experience, and conduct. (*Bernasco*, 138 Ill. 2d at 368.) The mental capacity of a defendant must be taken into consideration in determining whether a waiver was valid, and while mental

> deficiency, of itself, does not render a statement unintelligent, it is nonetheless a factor which must be considered in the totality of the circumstances under which the right to counsel was waived or a statement or confession given. (See *People v. Turner* (1973), 56 Ill. 2d 201, 206.) The greatest care must be taken to assure that a juvenile's incriminating statement was not the product of ignorance of rights or of adolescent fantasy, fright or despair. See *People v. Prude* (1977), 66 Ill. 2d 470, 476 (citing cases)." *In re W.C.*, 167 Ill. 2d at 327-28.

The *W.C.* court's references to a statement being unintelligent and its holding that the the mental capacity of a defendant is a factor which must be considered "in the totality of the circumstances under which the right to counsel was waived or a statement or confession given" (*In re W.C.*, 167 Ill. 2d at 328) support the proposition that when a mentally handicapped person makes a statement or confession, the court must not only determine whether the defendant voluntarily waived his constitutional rights, the court must also determine whether the confession or statement itself was voluntary.

Consequently, when the trial court ruled that Braggs' statements to the police were admissible because she was not in custody and *Miranda* was inapplicable, it was in error. Likewise, the court's ruling that, in the absence of police coercion or the defendant being in custody, the fact that Braggs was mentally handicapped was to be considered only as to the weight to be given her statements and not as to whether those statements were inadmissible, was in error. The court should have considered whether Braggs' statement to the detectives was voluntary in a State law sense based upon the totality of the circumstances. *People v. Bernasco*, 138 Ill. 2d at 356. One of the factors that the court should have considered was whether Braggs' mental retardation deprived her of "the capacity

to understand the meaning and effect of the confession." *People v. Hester*, 39 Ill. 2d at 500. This is particularly important in the present case, where the trial court found the defendant was incapable of waiving her rights under *Miranda* due to her diminished mental capacity.

As a practical matter, when a court determines that a defendant is capable of knowingly and intelligently waiving his or her constitutional rights, any confession or statement given by that defendant would also probably have been voluntary in that it was made knowingly and intelligently. Conversely, if a person is not capable of waiving his or her rights, his or her mental disability may well deprive him or her of the capacity to understand the meaning and effect of the confession. This is true even in the absence of coercion or police misconduct, such as in the present case. See *In re M.W.*, 314 Ill. App. 3d 64, 71 (2000) (if a *Miranda* waiver is not made intelligently and knowingly, a confession is not voluntary under Illinois law, even though the police satisfied federal constitutional safeguards). Consequently, when a court determines that a defendant is incapable of knowingly and intelligently waiving his or her rights, the court has an additional affirmative duty to determine whether the defendant's statement or confession was given voluntarily.

> "Whether a statement is voluntarily given depends upon the totality of the circumstances. The question must be answered on the facts of each case; no single fact is dispositive. Factors to consider when determining voluntariness include: the defendant's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning; the legality and duration of the detention; the duration of the questioning; and any physical or mental abuse by police, including the existence of threats or promises. *People v. Melock*, 149 Ill. 2d 423, 447-48 (1992); see *People v. Haymer*, 154 Ill. App. 3d 760, 770

(1987) (collecting cases)." *People v. Gilliam*, 172 Ill. 2d 484, 500-01 (1996).

Another factor to consider is the defendant's familiarity with the English language. *People v. Marts*, 266 Ill. App. 3d 531, 539 (1994). Our courts have added additional factors to consider in cases involving juveniles. These same factors are relevant to cases involving defendants who have the mental capacity of children. Perhaps the most important such factor is the presence of a parent or other adult concerned about the defendant's welfare. *People v. Kolakowski*, 319 Ill. App. 3d 200, 213 (2001). The need for close scrutiny of confessions from mentally handicapped persons by all concerned cannot be overstated. In 1967, the Supreme Court addressed its concern in cases involving confessions by juveniles when it held "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *In re Gault*, 387 U.S. at 55, 18 L. Ed. 2d at 561, 87 S. Ct. at 1458. This heightened concern in reviewing the admissibility of confessions given by juveniles should also be required in reviewing the admissibility of confessions by the mentally handicapped. As previously discussed, our supreme court has expressed these same concerns, including the possibility that such persons may falsely confess, in an unbroken line of cases since at least 1923. See *People v. Klyczek*, 307 Ill. 150.

In June of this year, the Supreme Court held that executions of mentally retarded criminals were "cruel and unusual punishment" prohibited by the eight amendment. *Atkins v. Virginia*, 536 U.S. ___, 153 L. Ed. 2d 335, 122 S. Ct. 2242, (2002). In so holding, the Court said "some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Atkins*, 536 U.S. at ___,

153 L. Ed. 2d 335 at 348, 122 S. Ct. at 2250. One of the bases espoused by the majority was the "reduced capacity" of mentally retarded offenders. As a result of this reduced capacity, mentally retarded defendants may be less able to give meaningful assistance to their counsel; they make poor witnesses and the possibility of false confessions is enhanced. *Atkins*, 536 U.S. at ___, 153 L. Ed. 2d 335 at 350, 122 S. Ct. at 2251-52.

The Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev. 2000) (hereinafter DSM-IV-TR) defines mental retardation as consisting of three features. The essential first feature is a significantly below-average general intellectual functioning as defined by the intelligence quotient (I.Q.). DSM-IV-TR at 41. This is accompanied by significant limitations in adaptive functioning. "Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standard of personal independence expected of someone in this particular age group, sociocultural background, and community setting." DSM-IV-TR at 42. Finally, the onset must occur before the age of 18 years. DSM-IV-TR at 41.

Mental retardation is classified by its degree of severity. The "highest" classification is "mild" mental retardation, and it applies to persons with I.Q. levels of 50 to 55 to approximately 70. DSM-IV-TR at 43. This group constitutes about 85% of those with the disorder. This group used to be referred to as "educable." "By their late teens, they can acquire academic skills up to approximately the sixth-grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress." DSM-IV-TR at 43.

The second classification is "moderate" mental retardation, and it applies to persons with I.Q. levels of 35 to 40

to 50 to 55. DSM-IV-TR at 42. This group constitutes about 10% of those with the disorder. This group used to be referred to as "trainable." They are unlikely to progress beyond the second-grade level in academic subjects. DSM-IV-TR at 43. Dr. Pan testified that Braggs belonged in this category.

"Severe" mental retardation applies to person with I.Q. levels of 20 to 25 to 35 to 40. "Profound" mental retardation applies to person with I.Q. levels below 20 to 25. DSM-IV-TR at 42.

Numerous law review articles have recently been written regarding the issues faced by the criminal justice system in dealing with mentally retarded suspects. See M. McCloud, *Words Without Meaning: The Constitution, Confessions and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495 Spring (2002), 495, (*McCloud*) for a comprehensive listing. In *McCloud*, the authors conducted tests to determine whether mentally retarded persons could understand the *Miranda* warnings. They concluded that, regardless of the level of disability, the mentally retarded subjects did not understand the Miranda warnings. Further, this inability was not lessened by the factors of the person's age, education or prior experience with the criminal justice system, including prior administration of the *Miranda* warnings. 69 U. Chi. L. Rev. at 538.

The authors cited several studies which indicated that mentally retarded suspects are more likely to confess to crimes they did not commit than do suspects of average intelligence. 69 U. Chi. L. Rev. at 503. This is true even in the absence of police overreaching. The authors specifically criticize Colorado v. *Connelly*'s exclusive focus upon governmental coercion. The authors assert that for a confession by a mentally retarded person to be admissible, it should be made knowingly and intelligently, and to determine this, courts must look to the "state of mind," the

intellectual and psychological capacity, of the person. 69 U. Chi. L. Rev. at 586-87. As previously explained in this opinion, for the last 80 years the supreme court of Illinois has required our courts to consider the mental capacity of the defendant as a factor when determining the admissibility of a confession.

Similarly, our supreme court first expressed its concern with the possibility that a person with limited communication skills might falsely confess some 80 years ago. *People v. Klyczek*, 307 Ill. at 155. Clearly, the best evidence to consider in determining whether a confession is false is the credibility of the confession itself. During the discharge hearing in the instant case, Braggs' statement was admitted. In that statement, Braggs said she knocked Rudolph to the floor, where he struck his head. However, Rudolph died of strangulation. When a person of normal intelligence provides false answers to the police, this is considered to be deception and this is treated as evidence of a "consciousness of guilt." *People v. Shaw*, 278 Ill. App. 3d 939, 951 (1996). Based upon our knowledge of the characteristics of the mentally retarded, false answers may well be the result of their desire to provide an answer they believe will please the interviewer.

We note that our legislature has required our courts to consider the reliability of statements made by children or mentally retarded persons before those statements may be admissible as exceptions to the hearsay rule. See 725 ILCS 5/115-10 (West Supp. 2001) (testimony regarding certain out of court statements made by the victim are admissible if: "[(b)](1) [t]he court finds in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient safeguards of reliability; and (2) [t]he child or moderately, severely or profoundly mentally retarded person either: (A) testifies at the proceeding; or (B) is unavailable as a witness and there is corroborative evidence of the act

which is the subject of the statement"). Similar language is also used in section 115-10.3, entitled "Hearsay exception regarding elder adults." 725 ILCS 5/115-10.3 (West Supp. 2001). These additional safeguards are required to ensure that certain evidence provided by mentally handicapped and child victims is reliable. These same concerns are present in cases involving confessions by mentally handicapped persons. They are also present in cases involving confessions by children, but that issue is not before us.

Based on all the above reasons, we reverse the order of the trial court denying Braggs' motion to suppress statements. We remand this matter for a new hearing on the motion to suppress. At that hearing, the trial court must consider the reliability of Braggs' statement and whether the statement was made voluntarily. In making this determination, the court must consider all of the factors set out by our supreme court in *People v. Gilliam*, 172 Ill. 2d at 500-01 (and the cases cited herein). The court must also determine whether Braggs' mental retardation deprived her of the capacity to understand the meaning and effect of her confession. After making this determination, the trial court is to conduct a new discharge hearing pursuant to section 104-25 of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-25 (West 1996). We note that much of the evidence presented at the motion to suppress hearing was unavailable to the court which conducted the 1996 discharge hearing.

Reversed and remanded with instructions.

CAMPBELL, P.J., and GREIMAN, J., concur.

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	NO. 93 CR 16707
v.	)	
MARY BRAGGS	)	

ORDER

This cause coming to be heard for Defendant's Motion to Suppress Statements, said motion being granted in part and denied in part, IT IS HEREBY ORDERED:

That Judge Richard Neville's ruling of June 27, 1996, wherein the defendant was found not not guilty and her treatment period was extended 5 years until June 27, 2001, is hereby reinstated. The defendant is recommitted to DHS, Alton Mental Health Center, for further treatment until June 27, 2001. DHS shall file a status report with the Court every 90 days.

November 17, 2000

s/_____
Stanley Sacks
Judge

ENTERED
HARRIET CONDELEE
NOV 17 2000
CLERK OF CIRCUIT COURT
CRIMINAL DIVISION
JUDGE _____

AURELIA PUCINSKI, CLERK OF THE CIRCUIT
COURT OF COOK COUNTY, ILLINOIS

FIFTH DIVISION
December 28, 1998

No. 1-97-0726

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the) Circuit Court of) Cook County
Plaintiff-Appellee,	)
v.	) No. 93 CR 16707
MARY BRAGGS,	) Honorable) Richard E. Neville,
Defendant-Appellant.	) Judge Presiding.

PRESIDING JUSTICE HOURIHANE delivered the opinion of the court:

On July 23, 1993, defendant Mary Braggs was indicted on two counts of first degree murder. On June 20, 1996, after refusing to conduct a hearing on a pending motion to suppress statements, the circuit court found that defendant was unfit to stand trial and, in all probability, would remain so indefinitely in light of her untreatable mental retardation. A discharge hearing followed. Therein, the circuit court found that the evidence introduced against defendant was sufficient to establish her guilt of first degree murder beyond a reasonable doubt. The circuit court then remanded defendant to the Department of Mental Health and Developmental Disabilities for a period of five years.

On appeal, defendant contends that (1) the circuit court erred in refusing to conduct a hearing on her motion to suppress statements and (2) the evidence introduced

against her was not sufficient to establish her guilt of first degree murder beyond a reasonable doubt.

For the reasons that follow, we remand.

BACKGROUND

On June 23, 1994, almost one year after her indictment, defendant was examined by Dr. Roni Seltzberg, a psychiatrist charged with assessing her fitness to stand trial. Based upon that examination, a fitness hearing was scheduled.

Prior to that hearing, defendant, through counsel, filed a motion to suppress all statements she made to various law enforcement officials, both at the time of her arrest and thereafter. Within that motion, defendant alleged that she was interrogated following her arrest on June 23, 1993, during which time she made statements that were not voluntary. According to defendant, although she was duly advised of her constitutional rights upon arrest, she was nevertheless unable to understand their full meaning because of her mental retardation. Defendant also alleged that her statements were obtained through psychological and mental coercion.

Shortly thereafter, the circuit court conducted a fitness hearing. At that hearing, Dr. Seltzberg testified that defendant, although aware of the nature of the charges against her, had a very limited understanding of the roles of the pertinent courtroom personnel and an equally poor understanding of the nature of the proceedings against her. Dr. Seltzberg concluded that, based upon her examination, defendant was not fit to stand trial, but may attain such fitness within one year, depending upon the seriousness of her mental retardation.

Counsel for defendant offered no evidence to the contrary.

The circuit court, after considering the evidence before it, accepted the testimony of Dr. Seltzberg and found defendant unfit to stand trial. In light thereof, the circuit court refused to consider the pending motion to suppress. Counsel for defendant objected, arguing that pursuant to section 104-11 of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-11 (West 1994)), the circuit court could hear such a motion in that the presence of defendant was not essential to a fair determination of the issues therein. The circuit court, disagreed, reasoning that defendant could not be unfit for some purposes, yet fit for others.

On May 16, 1996, almost two years later, defendant was examined by Dr. Philip Pan, another psychiatrist.

A hearing regarding the continuing unfitness of defendant was conducted shortly thereafter.

At that hearing, Dr. Pan testified that defendant remained unfit to stand trial in light of her continuing inability to understand the roles of the various courtroom personnel or the nature of the proceedings against her. Dr. Pan also testified that, based upon his examination, defendant would never be restored to the fitness necessary to stand trial because of the untreatable nature of her mental retardation.

No other fitness evidence was presented.

The circuit court then found, based upon the testimony of Dr. Pan, that defendant was still unfit to stand trial, and that she would remain so indefinitely.

A discharge hearing followed.

Therein, the State called Chicago police detective Allen Szudarski. He testified that he discovered the bodies of Connie Hall and Donald Rudolph on April 28, 1993, inside a ransacked first-floor apartment located at 4135 South

Prairie Avenue in Chicago. Hall was lying in a bedroom partially covered by a blanket. She had been stabbed multiple times in her back and side. Rudolph was lying in a hallway nearby. He had an injury to his chest. Both Hall and Rudolph were covered with blood.

Chicago police detective E. Winstead, as stipulated by the parties, testified that he interviewed defendant on May 9, 1993, and was told that Rudolph let Ron Thomas and another, taller black man into his apartment. Defendant was also present in the apartment at that time. Detective Winstead was further told that the taller man began to choke Rudolph, at which time defendant hid herself in a closet.

Detectives from the Chicago police department subsequently located Thomas, who, at the time he was found, was in the company of another, taller black man, Michael Wilburn. Both Thomas and Wilburn were alcoholics, and both denied any wrongdoing.

Defendant was then requestioned by detective Winstead. Detective Winstead stated that defendant then changed her story, claiming that she had previously been mistaken. Hall and Rudolph, defendant now explained, were not murdered by Thomas or anyone that she knew, but rather by two unknown black men who followed her home from the store.

Next, Chicago police detective James Cassidy testified that he interviewed defendant on June 25, 1993, after duly advising her of her constitutional rights. Defendant told him that she and Hall were in the apartment together when Rudolph returned. Rudolph was drunk and became violent, striking both her and Hall. Defendant explained that she then knocked Rudolph to the floor of the living room where he struck his head. Hall, in turn, became upset and accused her of killing Rudolph. According to detective Cassidy, defendant further stated that

Hall was stabbed a number of times in her upper body, and that she held Hall in her arms. Thereafter, defendant returned to the bedroom where she slept until the following morning. Upon waking, she gathered her clothes, which included a pair of white pants she had been wearing the prior evening, and left. Defendant further told detective Cassidy that she later discarded those pants because they no longer fit, not because they were blood-stained.

Also introduced into evidence was a stipulation that Hall died from numerous stab wounds, and that Rudolph died as a result of strangulation.

In her defense, defendant introduced a stipulation that, if called, detective Winstead would testify that he interviewed Arthur Collins, who, in addition to being Hall's uncle was also the last border his niece and Rudolph allowed in their apartment. Collins told detective Winstead that he moved earlier in April 1993 because there was too much activity and too many strangers in the apartment.

The circuit court, after considering the arguments of counsel, found the evidence introduced against defendant sufficient to establish her guilt of first degree murder beyond a reasonable doubt. The circuit court then remanded defendant to the Department of Mental Health and Developmental Disabilities for a period of five years.

Defendant appealed.

DISCUSSION

I.

Defendant initially contends that the circuit court erred in refusing to conduct a hearing on her motion to suppress statements. According to her, the provisions of section 104-11 of the Code of Criminal Procedure clearly envision a

circuit court conducting such a hearing, notwithstanding a prior finding of unfitness.

Section 104-11 of the Code provides, in pertinent part, as follows:

> "Following a finding of unfitness, *the court may hear and rule on any pretrial motion or motions if the defendant's presence is not essential to a fair determination of the issues.* A motion may be reheard upon a showing that evidence is available which was not available, due to the defendant's unfitness, when the motion was first decided. (Emphasis added.) 725 ILCS 5/104-11(d) (West 1996).

The foregoing provisions address themselves to all pretrial motions generally, which, by definition, includes motions to suppress. 725 ILCS 5/114-11 (West 1996). Accordingly, the circuit court erred in refusing to conduct a hearing on defendant's motion to suppress unless it can be said that the presence of defendant was essential to a fair determination of the issues raised therein.

Here, however, counsel for defendant specifically advised the circuit court, prior to the discharge hearing, that the presence of defendant was not necessary for a fair determination of the issues presented within her motion to suppress. Counsel for defendant also informed the circuit court that Dr. Linda Wetzel, a privately-retained psychologist, had examined defendant and would testify that the latter could not understand the constitutional rights of which she was admittedly advised due to the severity of her mental retardation. The circuit court was further informed that counsel for defendant would introduce evidence he believed would establish mental and psychological coercion in connection with the statements given by his client.

The circuit court declined to conduct a hearing on that motion, reasoning that, as a matter of law, a finding of

unfitness to stand trial necessarily precludes any hearing on a motion to suppress.

A finding of unfitness to stand trial does not necessarily preclude a hearing on a motion to suppress. See *People v. Lavold*, 262 Ill. App. 3d 984, 1003-004, 635 N.E.2d 919 (1994) (McNulty, J., dissenting); *People v. Fuhrman*, 233 Ill. App. 3d 503, 507, 599 N.E.2d 478 (1992); *People v. Burt*, 142 Ill. App. 3d 833, 837, 492 N.E.2d 233 (1986). Indeed, the provisions of section 104-11(d) of the Code expressly and explicitly allow for such a hearing, notwithstanding a prior finding of unfitness, where the presence of the defendant is not essential to a fair determination of the issues raised therein. 725 ILCS 5/104-11(d) (West 1996). As the aforementioned offer of proof established, the presence of defendant was not essential to a fair determination of the issues raised within her motion to suppress. The circuit court therefore erred in refusing to conduct a hearing on that motion.

II.

Defendant next contends that the evidence introduced against her was insufficient to establish her guilt of first degree murder beyond a reasonable doubt.

To the contrary, however, the evidence introduced against defendant, when viewed in its aspect most favorable to the State, was sufficient to establish her guilt beyond a reasonable doubt.

CONCLUSION

For the aforementioned reasons, we remand this matter for a hearing on the motion to suppress statements. In the event that motion is granted and the statements of defendant are suppressed, the circuit court shall conduct

a new discharge hearing at its earliest possible convenience.

Remanded with directions.

HARTMAN and THEIS, JJ., concur.